NO. 85-1335 (2)

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IN THE

Supreme Court of the United States

October Term, 1985

EMMA F. GILMERE, Individually and as Administratrix of the Estate of Thomas E. Patillo and for the benefit of his next of kin,

Petitioner

v.

CITY OF ATLANTA, GEORGIA, R. C. SAMPSON, LEE P. BROWN, MAYNARD JACKSON and GEORGE NAPPER,

Cross-Respondents

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CROSS-RESPONDENTS' BRIEF IN OPPOSITION

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The cross-respondents City of Atlanta, Georgia, R. C. Sampson, Lee P. Brown, Maynard Jackson and George Napper respectfully request that this Court deny the cross-petition for writ of certiorari, seeking review of the

Eleventh Circuit's opinion in this case. That opinion is reported at 774 F.2d 1495 (1985), and is set out in the appendix to the petition filed in this case sub nom. R. C. Sampson v. Emma F. Gilmere, No. 85-1186, January 10, 1986. All references to that opinion, the trial court's orders, and the opinion of the three-judge panel, are made to the appendices to the original petition and designated as "(Pet. ____a)."

STATEMENT OF THE CASE

In the interests of economy, cross-respondents will not make specific revisions or corrections to cross-petitioner's statement of facts, except to note that many of the statements made therein are comments on, or inferences from, the testimony and exhibits presented at trial, and are not reflected in the factual findings of the opinions below. Cross-respondent R. C. Sampson's statement of the case, set out on pages 3-11 of the petition

of R. C. Sampson v. Emma F. Gilmere, No. 85-1186, is adopted by all cross-respondents and incorporated herein by reference.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The issues presented by the question, whether the court below failed even to consider if an established policy of municipal liability resulted in decedent's death, are already before this Court in another case.

In what might be characterized as a recapitulation of her argument to the court below, the cross-petitioner asserts that the record supports the existence of a number of established municipal policies which sufficiently provide a basis for holding the City of Atlanta liable in this case. Neither the trial court nor the Eleventh Circuit concluded that such established municipal "policies" were supported by the evidence. Instead the cross-

petitioner's evidence was succinctly evaluated by the Eleventh Circuit as follows:

> At most she established that the City failed to train one single policeman properly in the appropriate methods of avoiding the use of deadly force.

(Pet. 195a-196a). This Court would be compelled to undertake a substantive review of the record, which neither the trial court nor the Eleventh Circuit found necessary, if it were to grant certiorari to examine all possible theories pursuant to which municipal liability might be established. This Court has stated its policy not to engage in such an undertaking. See, United States v. Johnston, 268 U.S. 220, 227, 45 S.Ct. 496, 497 (1925).

To the extent that cross-petitioner's question challenges the Eleventh Circuit's analysis of whether the municipality could be found liable for inadequate training of a given police officer, or for a single instance of excessive force used by that officer, such

issues are already presented to this Court and awaiting review. On March 10, 1986, the Court granted review in the case of City of Springfield v. Kibbe, No. 85-1217, on the questions of whether and how inadequate training of police officers can result in municipal liability under section 1983, and how the single incident rule of City of Oklahoma City v. Tuttle, ___ U.S. ___, 105 S.Ct. 2427, reh. denied, 106 S.Ct. 16 (1985), is to be interpreted. As will be shown below in Part 2 of this responsive brief, the facts of this case do not warrant a similar grant of review.

2. Facts unique to this case make inappropriate a review of the question whether the principle of gross negligence and deliberate indifference was properly applied.

In its review of the record of this case, the court below noted that this Court has left open the question of the use of the gross negligence standard for determining municipal liability

(Pet. 194a n.9, citing Tuttle, supra, 105 S.Ct. at 2436 n.7). Other circuits have explored the use of a standard of municipal indifference to unconstitutional activity as a basis of liability (Pet. 194a-195a n.7). The facts of this case, however, do not sufficiently raise the issue of the applicability of these standards, and for this reason certiorari should be denied.

The facts, as concurred in by the trial court and the Eleventh Circuit, were that the police officer in question received the standard six weeks' training when he joined the force, served five years, left his job for less than a year, and then was rehired with less than one day of re-training and none of the psychological testing administered to recruits at that time (Pet. 192a n.6, 117a n.24). Although the trial court found the municipality liable, it also specifically found that it discerned no municipal custom or policy of failing to train police officers, only that the

municipality "certainly failed to retrain Sampson upon his return to the Department" (Pet. 55a). The Eleventh Circuit characterized the officer's failure to receive further training upon being rehired as "an anomaly resulting from his prior service on the police force" (Pet. 198a). This Court has declined to review a similar set of circumstances in which a single officer missed training administered department-wide. See, Languirand v. Hayden, 721 F.2d 819 (5th Cir., 1983), cert. denied sub nom. Languirand v. City of Pass Christian, ___ U.S. ___, 104 S.Ct. 2656 (1984).

The issues raised by this question, whether the failure to train particular officers constitutes gross negligence, and whether the policy of inadequate training can be inferred from one or more officers' conduct during a single incident, are awaiting review by this Court in City of Springfield v. Kibbe, supra. The facts of this case, aptly described as anomalous, will add nothing to that review.

They do not approach any judicially accepted standard of municipal liability, and make the grant of certiorari inappropriate as to this question.

3. The question presented whether the courts below correctly construed and applied theories of supervisory liability involves only questions of evidence applied under acknowledged rules of law, and raises no substantial federal questions.

The issues raised by this question turn on the particular facts of this case only, and whether those facts meet the standards established by this Court for proving the liability of supervisory officials pursuant to 42 U.S.C. Section 1983. This issue has been resolved three times in favor of cross-respondents (Pet. 42a-45b, 149a-155a, 198a-199a), each time because it was found that the record failed to demonstrate an "affirmative link" between the tortious misconduct alleged and the adoption of a plan or

policy by the supervisors - express or otherwise - showing their authorization or approval of such misconduct. See, Rizzo v. Goode, 423 U.S. 362, 371, 96 S.Ct. 598, 604 (1976). The cross-petitioner does not quarrel directly with this standard, but instead asserts that cross-respondents Jackson, Brown and Napper are liable because "they failed in their statutory duty to properly train and supervise the officers" (Cross-pet. 53). No evidence to support this assertion has been offered, however. In fact, the trial court. emphasized the lack of probative evidence on this issue.

> Plaintiff concedes that she named Jackson as a Defendant merely because he appointed Brown and Napper. Plaintiff's Proposed Findings of Fact and Conclusions of Law at 9. Plaintiff presented no evidence regarding any further connection of Jackson to the events at issue here.

* * *

> Plaintiff presented no evidence of any direct participation by Brown and Napper in the shooting of Patillo . . . The "affirmative link" between Patillo's death and the actions of Brown and Napper must therefore concern their failure to implement an adequate training program. However, Plaintiff presented no evidence that Brown and Napper had any connection with the selection and training of Atlanta police officers, other than their "mere right to control" such activities.

(Pet. 42a-44a). No assistance has been given to the Court pointing out testimony or other evidence which would show the trial court's findings set out above to be clearly erroneous. This Court has ruled that certiorari will not be granted to review evidence and discuss specific facts. United States v. Johnston, supra. Because

consideration of this question will compel the review of the entire record merely to resolve, in the face of three judicial findings to the contrary, whether certain acknowledged legal standards were met, certiorari should be denied.

4. The question presented whether damages for the wrongful death of decedent were erroneously withheld raises no substantial federal question.

The cross-petitioner argues that the courts below erred in the amount of damages awarded for two reasons: first, because Section 1983 itself requires the adoption of state tort law which would have awarded the full value of decedent's life to his estate; and second, because a pendent state law claim for wrongful death was not recognized or compensated.

In its consideration of the issue of damages, the trial court noted that the dece-

dent left neither widow nor children (Pet. 59a), and that he was not contributing to the support of any of his adult siblings at the time of his death (Pet. 63a). Relying on this Court's holding, in Carey v. Piphus, 435 U.S. 247, 254, 98 S.Ct. 1042, 1047 (1978), that "the compensation principle" should determine the measure of damages under Section 1983 (Pet. 81a-82a), the trial court found that an award of the full value of the decedent's life would have over-compensated his siblings for their financial loss (Pet. 82a), and instead confined its award to an amount in compensation for the civil rights violations suffered by the decedent (Ibidem), and punitive damages.

To support her argument that Section 1983 itself compels the award of the full value of the decedent's life, cross-petitioner cites Carey v. Piphus, supra, Robertson v. Wegmann, 436 U.S. 584, 98 S.Ct. 1991 (1978), and Jones v. Hildebrant, 191 Colo. 1, 550 P.2d 339, cert. dismissed, 432 U.S. 183, overruled by

Espinoza v. O'Dell, 633 P.2d 455 (1981). None of these decisions establishes a principle which demonstrates that the pertinent rulings of the courts below are in error. Carey, as was ably pointed out by the trial court (Pet. 80a), does not require the incorporation of state torts damages rules in the making of awards in Section 1983 cases. 435 U.S. at 258, 98 S.Ct. at 1049. The ruling in Robertson was confined to the issue whether a civil rights action was abated by the plaintiff's death. 436 U.S. at 585, 98 S.Ct. at 1992. The Hildebrant petition for certiorari was simply dismissed as improvidently granted, and the Colorado Supreme Court subsequently overruled its prior decision to the extent it implied that state wrongful death limitations must be applied to a Section 1983 claim where the children of the decedent allege a separate deprivation of their liberty interest in a continuing relationship with their father. See, Espinoza, supra.

There is, in short, no binding precedent of this Court determinative of this issue. There is also no good reason why such precedent should be established through this action. As cross-petitioner has noted, the trial court's ruling was given cursory approval by the three judge panel (Pet. 98a n.8), and no discussion at all by the en banc panel. There is no conflict among the circuit courts of appeal.[1] Consideration of this issue before it is thoroughly delineated by the Eleventh and other circuits would be premature action by this Court.

The cross-petitioner's second assignment of error is the trial court's failure to recognize and compensate a pendent state law claim of wrongful death. This ruling did not result from an erroneous interpretation of civil

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1. In the decision cited by cross-petitioner, Brazier v. Cherry, 293 F.2d 401, cert. denied, 368 U.S. 921 (1961), the Fifth Circuit held only that in Georgia a decedent's claim for damages sustained during his lifetime survived his death, and that this rule would be applied to Section 1983 actions.

rights law, however, but from the trial court's careful review of the cross-petitioner's pleadings and determination that no cause of action for wrongful death had been pleaded (Pet. 83a-88a). No substantial federal question is raised thereby. It is undoubtedly unique to the facts of this case and unlikely to recur. Both the initial three-judge panel, and the en banc panel found it to be of insufficient substance to merit any discussion at all.

This is simply an issue of faulty pleading, and an award carefully drawn so as to prevent a windfall to heirs who had not suffered a substantial economic loss.[2] No substantial federal question has been raised or given such thorough consideration by the Eleventh or any other Court of Appeals as to warrant the grant of certiorari to address the question presented.

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2. This consideration did not, of course, prevent the trial court from awarding punitive damages (Pet. 68a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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